Duck Soup:[1] Recent Developments in Substantive Criminal Law

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Introduction

> *Take two turkeys, one goose, four cabbages, but no duck, and mix them together. After one taste, you'll duck soup for the rest of your life.*[2]

The past year presented a full menu of significant developments in military substantive criminal law. Some of these were full-course dinners, others only quick snacks, while a few may bring back memories of school cafeteria "mystery meat."[3] From legislation amending the Uniform Code of Military Justice (UCMJ) in a manner not seen in almost two decades, to a dramatic pronouncement from the Supreme Court, to substantial holdings from the Court of Appeals of the Armed Forces (CAAF), the year has seen developments in widely divergent areas of substantive criminal law. The diversity of these activities, combined with the breadth of substantive criminal law itself, makes it difficult to categorize them into clear trends.[4] Instead, this article separately analyzes each of the significant developments in legislation and case law. In doing so, it points out potential issues and provides guidance to military justice practitioners.

First, the article addresses three legislative amendments to the UCMJ: the enactment of a new article punishing offenses against an unborn child;[5] the extension of the statute of limitations for child abuse crimes;[6] and the modification of the crime of drunken driving.[7] Next, the article examines a landmark case in which the Court overturned its own precedent and struck down a state statute criminalizing acts of homosexual sodomy on constitutional grounds.[8] The article also considers a Supreme Court case addressing the defeat of a conspiracy by government agents and its effect on the addition of co-conspirators.[9] Finally, the article analyzes the CAAF's rulings from the past year in several areas of substantive criminal law, including general disorders and neglects,[10] sex crimes,[11] offenses against the administration of justice,[12] disobedience,[13] child pornography,[14] and the mistake of fact defense,[15] as well as the related matters of modification[16] and multiplicity.[17]

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1. DUCK SOUP (Paramount Pictures 1933) (following the Groucho Marx theme of this year's *Symposium*).

2. Tim Dirks, *The Greatest Films* (quoting Groucho Marx explaining the title of *Duck Soup*), *available at* http://www.greatestfilms.org/duck.html (last visited June 30, 2004). The author sincerely hopes this article's recipe will not have the same effect on the reader.

3. Readers may recall being served UFOs (unidentified food objects) in their school cafeterias. Often, these items were composed of mystery meat—the precise origin of which was unknown.

4. In addition to purely substantive matters (e.g., definitions of offenses and general principles of liability), this article addresses matters that are procedural in nature but are inherently tied to substantive crimes (e.g., pleading, amendment, and proof of offenses) and defenses (e.g., multiplicity, variance, and the statute of limitations).

5. UCMJ art. 119a (LEXIS 2004).

6. *Id.* art. 43.

7. *Id.* art. 111.

8. Lawrence v. Texas, 539 U.S. 558 (2003).

9. United States v. Jiminez Recio, 537 U.S. 270 (2003).

10. United States v. Saunders, 59 M.J. 1 (2003).

11. United States v. Simpson, 58 M.J. 368 (2003).

12. United States v. Teffeau, 58 M.J. 62 (2003); United States v. Fisher, 58 M.J. 300 (2003).

13. United States v. Moore, 58 M.J. 466 (2003); United States v. Thompkins, 58 M.J. 42 (2003).

14. United States v. O'Connor, 58 M.J. 450 (2003).

15. United States v. Hibbard, 58 M.J. 71 (2003).

Legislative Changes to the UCMJ

Article 119a, UCMJ

During the past year, Congress passed two laws amending the UCMJ. Most recently, the Unborn Victims of Violence Act of 2004 (Laci and Connor's Law) was signed into law by President Bush on 1 April 2004.[18] The Act created a new punitive UCMJ article—the first enumerated offense added by Congress in almost two decades—which will have a significant impact on certain prosecutions under the military justice system.

Article 119a creates additional liability for specified offenses that cause death or injury to an unborn child.[19] The underlying crimes covered by Article 119a are murder (Article 118); voluntary manslaughter (Article 119(a)); involuntary "misdemeanor manslaughter" (Article 119(b)(2));[20] robbery (Article 122); maiming (Article 124); arson (Article 126); and assault (Article 128).[21] When an accused commits any of these offenses against an unborn child's mother and thereby causes death or injury to the unborn child, he may be punished and convicted separately for both offenses.[22] The maximum punishment for violating Article 119a appears to be the same as if the resultant injury or death was inflicted on the unborn child's mother; however, the death penalty is specifically excluded as an authorized punishment.[23]

Article 119a contains three specific exemptions for death or injury caused by a consensual abortion, by medical treatment, or by the mother.[24] Aside from these limitations, the scope of liability under Article 119a appears to be extraordinarily broad.[25] By its own terms, Article 119a requires no proof of any mental state of the accused, not even a negligent failure to know the unborn child's mother is pregnant.[26] Apparently, the *mens rea* for the underlying offense is the only mental state required for liability.[27] Furthermore, the class of potential victims—unborn children—is broadly defined.[28]

Finally, the text of Article 119a is ambiguous in one respect. Although the article requires no intent to kill or injure, it specifically addresses an accused who intentionally kills or attempts to kill an unborn child.[29] Unfortunately, Article 119a does not

16. United States v. Parker, 59 M.J. 195 (2003); United States v. Lovett, 59 M.J. 230 (2004); United States v. Walters, 58 M.J. 391 (2003); United States v. Teffeau, 58 M.J. 62 (2003).

17. United States v. Hudson, 59 M.J. 357 (2004).

18. Pub. L. No. 108-212, 118 Stat. 568.

19. UCMJ art. 119a(a)(1) (LEXIS 2004).

20. "Misdemeanor manslaughter" is shorthand for an unlawful killing that occurs while the accused is perpetrating or attempting to perpetrate an offense directly affecting the person (other than those underlying offenses listed for felony murder). *See, e.g.*, United States v. Henderson, 23 M.J. 77, 81 (C.M.A. 1986); United States v. Waluski, 21 C.M.R. 46 (C.M.A. 1956). Note that Article 119a does *not* include the more common form of involuntary manslaughter, which involves a killing caused by a culpably negligent act or omission. *See* UCMJ art. 119(b)(1) (2002).

21. *Id*. art. 128. Notably, the text of Article 119a does not limit its application to any theory of assault or any minimum *mens rea* under Article 128. Thus, an offer-type assault involving only a culpably negligent act or omission may be punishable under Article 119a if it causes injury to an unborn child, even if the mother was not touched or otherwise harmed. If the unborn child dies, then the accused faces the same maximum punishment as if the mother had died. In effect, this is the same punishment as Article 119(b)(1), involuntary manslaughter, which is not listed as an underlying offense that triggers Article 119a. This may lead to a counter-intuitive result in some cases. For example, if an accused commits simple assault on a mother by culpable negligence and her unborn baby dies, he is liable under Article 119a. Yet if he unlawfully kills *both* a mother and her unborn child through culpable negligence, then he may not liable for the child's death under Article 119a, unless he is charged only with assault of the mother. *See id.* arts. 119(a),(b).

22. UCMJ art. 119a(a)(1) (LEXIS 2004).

23. *See id.* The punishment "shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother." *Id.* At the time of this writing, no punishments have been prescribed for Article 119a. *See* UCMJ art. 56 (2002).

24. *Id*. art. 119a(c).

25. One significant limitation, though briefly mentioned in the article itself, is the requirement for causation, which exists for all the UCMJ homicide offenses. If an accused's conduct is not the proximate cause of injury or death, then he should not be liable under Article 119a. *See generally* United States v. Riley, 58 M.J. 305, 312 (2003) (citing United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1975)).

26. UCMJ art. 119a(a)(2) (LEXIS 2004). Thus, an accused may be convicted even if he had absolutely no reason to know the victim was pregnant. For example, if a husband shoves his wife to the floor, not realizing she is one-month pregnant, and she miscarries, he may be found guilty of Article 119a. *See id*.

27. In this regard, Article 119a is comparable to Article 118(3) felony murder or Article 119(b)(2) misdemeanor manslaughter, neither of which requires additional *mens rea* beyond that of the underlying offense. *See* UCMJ arts. 118, 119 (2002). Of course, in most cases, these offenses involve an accused who is at least aware that the victim *exists*, unlike Article 119a, which explicitly requires no such knowledge as a predicate for its potentially great punishment.

28. "Unborn child," "child in utero," and "child, who is in utero" are defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.* art. 119a(d).

clearly state how such an accused should be charged.[30] Absent future legislation clarifying this issue, it will likely remain unresolved until the CAAF conclusively decides what Congress intended.[31]

Article 43, UCMJ

In November 2003, Congress passed the National Defense Authorization Act for Fiscal Year 2004, which amended two existing UCMJ articles.[32] In Article 43, the Act extended the statute of limitations period for "child abuse offenses," defined as physical or sexual abuse of a person under age sixteen, in violation of any of several specified articles of the UCMJ.[33] For these offenses, the limitations period was previously five years; it now runs until the child victim's twenty-fifth birthday.[34] As amended, the article raises some important issues.

First, the amendment created a patent ambiguity in Article 43.[35] The list of offenses subject to the amended statute includes the rape of a child, but the crime of rape itself has no limitations period because it is a capital offense.[36] Some will argue that the rape of a child victim should be subject to the new limitations period.[37] But this interpretation would lead to an absurd result: a prosecution for the rape of a child victim may be time-barred, while a prosecution for the rape of an adult at the same time would be permitted.[38] Unless this was the intended result, which seems unlikely, Congress should delete the reference to rape in Article 43 to avoid confusion.

Second, the Act does not address whether the amendment is retroactive. That is, will it permit prosecution of an offense whose limitations period expired before 24 November 2003? Alternatively, will it extend an unexpired limitations period for a crime committed before that date? Some may interpret the Act's silence on these issues as permitting the new limitations period to apply retroactively.[39] But even if Congress intended the amendment to be retroactive, a recent Supreme Court case would limit its reach. In *Stogner v. California*, the Court held that reviving a criminal prosecution using a statute enacted after

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29. Article 119a(a)(3) reads:

> If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

Id. art. 119a(a)(3).

30. *Id*. Under one interpretation, such an accused would not be guilty of Article 119a; he would instead be charged and convicted under Articles 80, 118, or 119(a). If so, this would effectively give an unborn child victim the same status as an adult victim under those UCMJ Articles, and it would require modification of the elements of Articles 118 and 119. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 43b, 44b (2002) [hereinafter MCM]. A second interpretation is that the language merely shows Congress' explicit intent to incorporate the maximum punishment for those Articles; such an accused would still be charged under Article 119a.

31. In the interim, counsel may see intentional or attempted killings of unborn children charged in the alternative, under both Article 119a and the other applicable punitive article.

32. Pub. L. No. 108-136, §§ 551-52, 117 Stat. 1392.

33. UCMJ art. 43 (LEXIS 2004). The following offenses are listed: Rape or carnal knowledge (Article 124); Maiming (Article 124); Sodomy (Article 125); Battery or aggravated assault (Article 128); Indecent assault, acts, or liberties with a child (Article 134); Assault with intent to commit murder, voluntary manslaughter, rape, or sodomy (Article 134). *Id.* Note that the Act lists "[s]odomy in violation of § 925 of [title 10] (*article 126*)." *Id.* (emphasis added). This is clearly a drafting error, as Article 126 covers the offense of arson and is contained in 10 U.S.C. § 926. Nevertheless, to avoid unnecessary confusion, Congress should fix this error at the earliest opportunity.

34. This change does not affect the limitations period for offenses punished under Article 15 nonjudicial proceedings, which remains two years. UCMJ art. 43(b)(3) (2002).

35. UCMJ art. 43(b)(1) (LEXIS 2004) states, "Except as otherwise provided under this section (article)," the five-year time limitation applies. The offense of rape, however, is "otherwise provided" for under two conflicting sub-paragraphs of the amended article. *Compare id.* art. 43(a), *with* art. 43(b)(2)(A).

36. *See id.* art. 43(a). Although the maximum punishment for rape is death, the death penalty may be adjudged only when the victim is under the age of twelve or when the accused maimed or attempted to kill the victim. *See* MCM, *supra* note 30, pt. IV, ¶ 45e(1), R.C.M. 1004(c)(9). Nevertheless, rape is still considered a capital offense for the purposes of Article 43, so the default five-year limitations period does not apply. *See* Willenbring v. Neurauter, 48 M.J. 152, 178-80 (1998), *cert. denied*, 537 U.S. 1112 (2003).

37. This interpretation is supported by several "canons" of statutory interpretation. *See* LaFave, Substantive Criminal Law § 2.2 (2d ed. 2003). Under the plain meaning rule, Article 43(b)(2) clearly states that rape of a child under Article 120 is subject to the new law. The "later controls the earlier" and "special controls the general" canons lend further support to a claim that the revised portions of Article 43 should trump the earlier, more general provisions. Finally, strict construction, or lenity, supports applying the law in favor of an accused whose acts would be barred from prosecution under the new rule.

38. For example, if an accused rapes both an adult and a six-year-old child on the same date, then twenty years later he could be tried for raping the adult victim but not for raping the child.

the limitations period expired violates the *Ex Post Facto* Clause of the Constitution.[40] The Court distinguished its holding, however, from cases in which pre-existing limitations periods had not yet run.[41] Thus, as amended, Article 43 could still apply to acts committed before 24 November 2003 and extend any limitations periods that had not expired on that date.

Article 111, UCMJ

The 2004 National Defense Authorization Act also made comparatively minor, yet noteworthy, changes to Article 111, UCMJ.[42] First, the Act amended the threshold for the blood alcohol content (BAC) that serves as an alternative element of the offense.[43] The standard is now a BAC "equal to or exceed[ing] the applicable limits."[44] Thus, a person who operates a vehicle with a BAC of exactly 0.10 now violates Article 111. Second, the Act clarified which BAC limit applies, according to the location of the conduct. The applicable limit within the United States is now the law of the state in which the conduct occurs or a BAC of 0.10, whichever is lower.[45] Finally, the Act made slight changes to the definition of "blood alcohol content limit" and eliminated all other references to "maximum" BAC limits in the article.[46]

Taken together, these changes will not radically alter the day-to-day business of a military justice practitioner, but they will potentially affect many cases involving child abuse, offenses against pregnant mothers, and drunken driving offenses. In the near future, counsel should remain alert for executive orders implementing these changes into the *Manual for Courts-Martial* (*MCM*).

Supreme Court Cases

Is Private, Consensual Sodomy a Crime? Lawrence v. Texas[47]

Responding to a reported weapons disturbance in a private residence, Houston police officers entered John Lawrence's apartment and found him and another adult man, Tyron Garner, engaging in consensual sodomy. Both men were arrested and held overnight.[48] The following day, they were convicted for violating a Texas law forbidding "deviate sexual intercourse with another individual of the same sex."[49] Lawrence and Garner challenged the statute as a violation of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution.[50] The Court of Appeals for the Texas Fourteenth District, sitting *en banc*, affirmed the convictions, relying on the U.S. Supreme Court's decision in *Bowers v. Hardwick*.[51] In *Bowers*, the Court, in a five-to-four decision, upheld a Georgia statute prohibiting consensual sodomy, whether or not the participants were of the same sex.[52]

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39. In support of this proposition, proponents may argue that in 1986, when Congress extended the statute of limitations from three to five years, it included a provision limiting the amendment to acts committed on or after its effective date. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 805(c), 100 Stat. 3908 (1986). The current amendment lacks a similar provision, which arguably shows legislative intent to allow retroactive application.

40. Stogner v. California, 539 U.S. 607 (2003).

41. *Id*. at 618. "Even where courts have upheld extensions if *unexpired* statutes of limitations (extensions that our holding today does not affect . . .), they have consistently distinguished situations where limitations periods have *expired*." *Id.*

42. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392.

43. The standard previously read "in excess of the applicable limits." UCMJ art. 111(a)(2) (2002). The 2002 edition of the *MCM* does not contain the substantial amendments to Article 111, including the addition of subsection (b), enacted on 28 December 2001 as part of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 581, 115 Stat. 1123 (2001).

44. UCMJ art. 111(a)(2) (LEXIS 2004). A blood alcohol content of 0.10 means 0.10 grams of alcohol per 100 milliliters of blood or per 210 liters of breath. *See id*. art. 111(b)(3).

45. *Id*. art. 111(b)(1)(A). The provisions regarding military installations located in more than one state have not changed. *See id*. art. 111(b)(2).

46. *See id.* art. 111(b)(1)(B), (b)(3), (b)(4)(A).

47. Lawrence v. Texas, 539 U.S. 558 (2003).

48. *Id*. at 562-63.

49. Tex. Penal Code Ann. § 21.06(a) (Vernon 1994). Under Texas law, "deviate sexual intercourse" includes "any contact between any part of the genitals of one person and the mouth or anus of another person." *Id.* § 21.01(1).

50. U.S. Const. amend. XIV, § 1.

51. Lawrence v. State, 41 S.W. 3d 349 (Tex. App. 2001) (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

52. *Bowers*, 478 U.S. at 186. The *Bowers* majority framed the issue in that case as "whether the Federal Constitution confers a fundamental right on homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190.

The Supreme Court granted certiorari and reversed the Texas Court of Appeals' judgment in a six-to-three decision.[53] In an opinion by Justice Kennedy, the Court found the Texas statute unconstitutional as applied to adults engaged in consensual sodomy in a private setting, and in doing so, explicitly overturned *Bowers*.[54] The Due Process Clause gives consenting adults the right to engage in private sexual conduct without government intervention, and in the majority's view, the Texas statute furthered no legitimate state interest to sufficiently justify its intrusion into an individual's personal and private life.[55] In reaching its decision, the Court expressly declined to rely on the petitioners' Equal Protection argument, stating, "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[56]

Justice Scalia, writing in dissent, claimed the majority did not recognize homosexual sodomy as a fundamental right and therefore misapplied the rational basis standard of review.[57] He also chastised the majority for their willingness to overrule the Court's precedent in *Bowers*.[58] In doing so, Scalia challenged the majority's conclusion that there has been little reliance on the decision. Citing a long list of cases that have relied on *Bowers*, to include those upholding the military's homosexual conduct policy, Scalia predicted that *Lawrence* will cause a "massive disruption of the current social order."[59]

What effect will *Lawrence* have on the military and in particular, on Article 125, the prohibition against sodomy? Potentially, its impact will be tremendous. In fact, some will argue *Lawrence* tolls the death knell for Article 125. Certainly, the Court's opinion leaves little room to distinguish Article 125 on its face.[60] The language of the decision is expansive, although the Court did narrow its reach at one point. Noting the case did not involve public conduct, prostitution, minors, persons who might be injured or coerced, or those who might not easily refuse consent, the Court apparently left open the door to prosecution in those areas.[61]

It is also important to note the obvious: *Lawrence* is not a military case. This is significant because the Court has recognized the increased regulation of individual rights in the military, as a separate society requiring good order and discipline.[62] Historically, the UCMJ and military commanders have regulated subordinates' personal lives to a much greater extent than would ever be permissible under civilian laws. The UCMJ prohibits fraternization and adultery, and commanders typically restrict many types of otherwise "private" behavior, to include sexual activity, through punitive orders and regulations.[63] So the privacy and liberty interests underpinning *Lawrence* may not exist to the same extent in military society, particularly in a deployed setting or in a military barracks environment. Several military cases are currently pending review by the CAAF based on the *Lawrence* decision.[64] Regardless of the CAAF's decisions in these and other cases, it is perhaps inevitable that some cases will reach the Supreme Court, so the issue may not be resolved for years to come.

In the short term, then, what should military practitioners do? It appears that sodomy by force or coercion, with a minor, in public, or with a prostitute remains a viable offense, even

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53. *Lawrence*, 539 U.S. at 558. Significantly, the *Lawrence* majority framed the issue as "whether the petitioners were free as adults to engage in the [sic] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564. Given the clear difference between the issues framed by the Court in each case, it is no surprise that the results in *Bowers* and *Lawrence* were different.

54. *Id.* at 579.

55. *Id*. at 578-79.

56. *Id.* at 575.

57. *Id.* at 586-87 (Scalia, J., dissenting).

58. *Id.* at 586-91.

59. *Id.* at 589-91.

60. Unlike the Texas statute at issue in *Lawrence*, the UCMJ prohibits both homosexual and heterosexual sodomy. UCMJ art. 125 (2002). As noted above, however, the *Lawrence* majority plainly intended its decision to cover all laws prohibiting private, consensual sodomy, regardless of the sex of the participants. *See* text accompanying *supra* note 56.

61. *Id.* at 578.

62. *See* Parker v. Levy, 417 U.S. 733, 743-44 (1974).

63. *See, e.g*., MCM, *supra* note 30, pt. IV, ¶ 62 (adultery), ¶ 83 (fraternization); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 4-14 through 4-16 (13 May 2002).

64. At the time of this writing, the CAAF had granted petitions for review in the following cases: United States v. Marcum, 59 M.J. 131 (2003), *rev. granted*, 59 M.J. 142 (2003); United States v. 59 M.J. 146 (2003), *rev. granted*, 59 M.J. 147 (2003); United States v. Bodin, No. 03-0589/AR, *rev. granted*, CCA 20000525; United States v. Hall, CCA 200100832, *rev. granted*, 59 M.J. 223 (2003); United States v. Asbury, CCA 20030367, *rev. granted*, 2004 CAAF LEXIS 42 (Jan. 7, 2004).

after *Lawrence*. Also, when there is a strong tie between the conduct and good order and discipline, charging sodomy may still be a sound decision. Even so, since the law is still unsettled in this area, it would be wise to also charge the conduct as a general disorder under Article 134, so that if the sodomy charge is later dismissed, the Article 134 conviction may still stand.[65] Of course, defense counsel should continue to cite *Lawrence* in challenging sodomy charges at every level of the military justice system, from trial through appeal. Doing so will force the government to justify its charging decision and perhaps expedite the resolution of this contentious issue.

Does Defeat Terminate a Conspiracy?
United States v. Jiminez Recio[66]

Police in Nevada seized a truck carrying illegal drugs and set up a sting operation using the truck's drivers. After driving the truck to Idaho, agents had the drivers page their contact, who said he would call someone to get the truck. Francisco Jiminez Recio and Adrian Lopez-Meza arrived and were arrested after driving the truck away. Although there was little evidence that either defendant was involved in the conspiracy before government agents intervened, both men were convicted of conspiracy to possess and distribute illegal drugs.[67] At the time, case law in the United States Ninth Circuit established that defendants could not be charged with conspiracy if they were brought into a scheme only after law enforcement authorities had already intervened, and their involvement was prompted by the intervention.[68] The Ninth Circuit Court of Appeals reversed and dismissed the respondents' convictions with prejudice, finding the evidence presented at trial insufficient to show they entered the conspiracy before police seized the drugs.[69]

The U.S. Supreme Court reversed the Ninth Circuit, holding that a conspiracy does not automatically terminate simply because the government has defeated its object.[70] The Court noted that under basic conspiracy law, the agreement to commit an unlawful act is "'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'"[71] Further, a conspiracy poses a danger beyond the threat of the object crime, because the "combination in crime makes more likely the commission of [other] crimes," and because it "decreases the probability that the individuals involved will depart from their path of criminality."[72] This danger remains—as does the agreement—even after police have frustrated a conspiracy's objective, because conspirators who are unaware of police involvement have neither abandoned nor withdrawn from the conspiracy.[73] In response to claims that such a rule threatens "endless" potential liability, the Court stated that the defense of entrapment prevents the government from drawing an unlimited number of persons into the conspiracy.[74]

Although the case would have had a much more substantial impact on military justice had the Court decided the other way, *Jiminez Recio* still merits consideration, because it makes clear that defeat or impossibility does not automatically terminate a conspiracy.[75] This termination point is significant for several reasons. It not only affects whether new members can join, it also affects other issues common to conspiracy cases, such as vicarious liability for crimes by other parties, the admissibility of co-conspirators' statements, and the commencement of the statute of limitations period, all of which are tied to the life of the conspiracy.[76] While the result in *Jiminez Recio* is consistent with military practice in that factual impossibility is no defense to conspiracy, military courts have not squarely addressed the issue of adding members after a conspiracy is "defeated."[77]

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65. Counsel may do so by using language similar to that in the model specification for Article 125 with the addition of a clause stating that the conduct was prejudicial to good order and discipline and/or service-discrediting. Under normal circumstances, charging in this manner may violate the Preemption Doctrine. *See* MCM, *supra* note 30, pt. IV, ¶ 60c(5)(a). If an Article 125 charge is found to be unconstitutional, however, then charging the conduct under Article 134 should not be preempted. At the very least, charging the conduct under both Articles 125 and 134 would satisfy an accused's due process notice rights and permit the military judge to instruct on the Article 134 charge as a lesser-included offense. *See infra* note 150 for a discussion of charging child pornography offenses in a similar manner.

66. United States v. Jiminez Recio, 537 U.S. 270 (2003).

67. *Id*. at 272-73.

68. United States v. Cruz, 127 F.3d 791, 795 (9th Cir. 1997).

69. United States v. Recio, 258 F.3d 1069, 1074 (9th Cir. 2000).

70. *Jiminez Recio*, 537 U.S. at 274. Thus, a conspiracy does not end through "defeat" when the government intervenes, making the conspiracy's goals impossible to achieve, even if the conspirators do not know that the government has intervened and are unaware that the conspiracy is bound to fail. *Id.*

71. *Id*. (quoting Salinas v. United States, 522 U.S. 52, 65 (1997)).

72. *Id*. at 275 (quoting Callanan v. United States, 364 U.S. 587, 593-94 (1961)).

73. *Id.*

74. *Id.* at 276.

75. Under military case law, a conspiracy ends when the objectives are accomplished, the aims are abandoned, or when the members withdraw. *See, e.g.*, United States v. Hooper, 4 M.J. 830, 836 (C.M.R. 1978) (citing United States v. Beverly, 34 C.M.R. 248 (C.M.A. 1964); United States v. Salisbury, 33 C.M.R. 383 (C.M.A 1963); United States v. Miasel, 24 C.M.R. 18 (C.M.A. 1957)).

Lastly, the case also affirms the rationale for making conspiracy a separate crime, which is periodically a source of contention both within the military justice system and among legal scholars.[78]

CAAF Cases

Harassment Is an Offense under Article 134
United States v. Saunders[79]

Specialist (SPC) Daniel Saunders was stationed in Germany when he became engaged to "H," a German national. After some time, H began to tire of SPC Saunders' increasingly possessive treatment and told him she wanted to end the relationship. Undeterred, SPC Saunders visited H and called her at home and work with growing frequency. Over the next few months, his behavior became more and more erratic, making H feel uneasy. He apparently copied a "hidden" emergency key and used it to enter H's apartment without her consent. During two visits, SPC Saunders locked himself in H's kitchen and threatened to kill himself. Even after receiving a no-contact order from his commander, SPC Saunders continued to call and visit H. Events finally came to a head shortly after SPC Saunders stopped by H's apartment, demanding that she return letters and gifts he had given her. The electricity went out in H's apartment, and when she went to check the fuse box, SPC Saunders pulled her inside the apartment and sexually assaulted her.[80]

Specialist Saunders was charged with "harassment" as service-discrediting conduct in violation of Article 134, Clause 2. Because the UCMJ contains no specific offense covering this course of conduct, and because the federal Assimilative Crimes Act (ACA) does not apply to crimes committed overseas,[81] the government modeled the specification after a Georgia "anti-stalking" statute.[82] Significantly, the specification added a service-discrediting element and omitted the Georgia law's requirement that the conduct be done "for the purpose of harassing and intimidating the other person."[83] In a trial before members, the military judge denied a defense motion to dismiss the specification for failure to state an offense, and she instructed the panel, defining harassment as "a knowing and willful course of conduct directed at a specific person which would cause substantial emotional distress in a reasonable person or which placed that person in reasonable fear of bodily injury."[84] The panel found SPC Saunders guilty of the offense.[85]

On appeal, the CAAF affirmed the conviction in a unanimous decision, holding that the specification adequately stated an offense and that SPC Saunders had sufficient notice that his conduct was subject to criminal sanction.[86] In doing so, the court reviewed the two components of "notice" required for criminal liability.

First, due process notice requires that a person have fair warning that his contemplated conduct is subject to criminal sanction.[87] In a previous decision during its 2003 term, *United States v. Vaughan*, the CAAF affirmed a conviction for child neglect charged under Article 134, Clause 2.[88] As in *Saunders*, Vaughan's misconduct was not captured under the enumerated articles of the UCMJ, and because the acts occurred in Germany, the government was unable to assimilate local child neglect laws under the ACA. Nevertheless, the CAAF reasoned that Vaughan received "fair notice" that her conduct was

76. *See* MCM, *supra* note 30, pt. IV, ¶ 5c(5); *id.* MIL. R. EVID. 801(d)(2)(E).

77. *See id.* pt. IV, ¶ 5c(7).

78. *See, e.g.*, Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001, at 79 (citing Judge Learned Hand in referring to conspiracy as "the darling of the prosecutor's nursery"); *see also* Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39 (1977); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003).

79. United States v. Saunders, 59 M.J. 1 (2003).

80. *Id*. at 2-4.

81. 18 U.S.C. § 13 (2000).

82. GA. CODE ANN. § 16-5-90 (1997). The Georgia law prohibits a knowing and willful course of conduct, directed at a victim, which causes emotional distress by placing the victim in reasonable fear of death or bodily harm. *Id.* The *Saunders* opinion contains the entire specification, which may be helpful to counsel in future cases. *See Saunders*, 59 M.J. at 5.

83. *Id*. at 6 n.5.

84. *Id.* at 5.

85. The members excepted and substituted language in the specification to accurately reflect the overt acts committed by the accused. *See id*.

86. *Id*. at 9.

87. *Id*. at 6 (citing United States v. Vaughan, 58 M.J. 29, 31 (2003)).

criminal from several other sources, including state laws, military case law, military custom and usage, and military regulations.[89]

In *Saunders*, the court recognized that the accused's conduct was likewise prohibited, in varying degrees, by "anti-stalking" statutes in all fifty states and in the District of Columbia.[90] The court also identified a federal criminal law—the interstate stalking statute—which would prohibit SPC Saunders' course of conduct if it occurred under necessary jurisdictional conditions within the United States.[91] Taken together, these statutes and cases provided SPC Saunders fair notice that his course of conduct was subject to criminal prosecution.

The court also found that framing the accused's acts as service-discrediting misconduct, rather than as a specific intent offense, did not deprive him of fair notice.[92] Citing Supreme Court precedent, the court noted that charging service-discrediting conduct does not necessarily require published advance notice of the precise elements; rather, the full spectrum of what is service-discrediting may be defined by military custom and usage.[93] Here, SPC Saunders was on fair notice that his course of conduct was criminal, because a reasonable soldier would have understood such actions were service-discrediting.[94]

To satisfy the second component of notice, the accused must have "fair notice as to the standard applicable to the forbidden conduct" against which he must defend.[95] Here, the court held that the specification provided SPC Saunders with adequate notice of the elements of the offense and described conduct a reasonable fact finder could determine was service-discrediting in the context presented.[96]

The result in *Saunders*, taken together with *Vaughan*, is noteworthy for several reasons. First, the cases expressly permit charging stalking and child neglect under Article 134, Clause 2. This is particularly significant to prosecutors in an overseas environment, where there is no local law to assimilate under the ACA. In recognizing the offenses as service-discrediting misconduct, the court resolved a split among the service courts. Until *Vaughan* was decided, the Army did not recognize child neglect as a viable offense under Article 134 when no actual harm came to the child, but the Air Force had allowed such an offense.[97] Second, the CAAF opened the door to charging a wide range of conduct that would otherwise be punishable only under state law. Thus, when faced with unusual fact situations not covered by the enumerated UCMJ crimes, the government may seek out relevant state law and other sources, both to assist in drafting specifications and instructions and to satisfy due process notice requirements. Counsel, however, should take note of the CAAF's exhaustive review of relevant state statutes in *Saunders*. Not all charged conduct will be prohibited by federal and state law to the same extent as stalking or child neglect. Counsel for both sides should examine how consistently these other sources of law track the conduct in a pending case and argue whether such sources effectively satisfy the accused's right to fair notice that the charged conduct is criminal.

Finally, *Saunders* and *Vaughan* may indicate the CAAF's increasing willingness to accept non-typical charging practices when the purpose of doing so closes a "loophole" that effectively gives overseas military members license to commit acts that would be criminal in the United States. By permitting such offenses to be charged under Article 134, the CAAF has given additional protection to victims—specifically, targets of harassment and children at risk of harm—where their location overseas previously afforded them far less robust protection.

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88. *Vaughan*, 58 M.J. at 30; *see* Major David D. Velloney, *Recent Developments in Substantive Criminal Law: A Continuing Education*, ARMY LAW., Apr./May 2003, at 74 (discussing *Vaughan*).

89. *Vaughan*, 58 M.J. at 31-32.

90. *Saunders*, 59 M.J. at 7. Military practitioners should note that some of these laws have legitimately served as the basis for courts-martial convictions when assimilated under the ACA and charged as violations of Article 134, Clause 3. *Id.* at 8 (citing United States v. Sweeney, 48 M.J. 117 (2000); United States v. Rowe, ACM No. 32852, 1999 CCA LEXIS 125 (A.F. Ct. Crim. App. 1999), *rev. denied*, 52 M.J. 417 (1999)).

91. *Id.* at 7 (citing 18 U.S.C. § 2261A (1997)).

92. *Id.* at 9.

93. *Id.* at 8-9 (citing Parker v. Levy, 417 U.S. 733, 752-56 (1974)).

94. *Id.* at 9.

95. *Id.* (quoting United States v. Vaughan, 58 M.J. 29, 31 (2003) (citing Parker v. Levy, 417 U.S. 733, 755 (1974))).

96. *Id.* at 9-10.

97. *See Vaughan*, 58 M.J. at 31-32; *compare* United States v. Wallace, 31 M.J. 561 (A.C.M.R. 1991), *with* United States v. Foreman, ACM No. 28008, CMR LEXIS 622 (A.F.C.M.R. May 25, 1990) (unpublished).

Constructive Force in Non-Consensual Sex Offenses
United States v. Simpson[98]

For eighteen months, Staff Sergeant (SSG) Delmar Simpson was a drill sergeant assigned to the U.S. Army Ordnance Center and School at Aberdeen Proving Ground, Maryland.[99] During this period, SSG Simpson participated in numerous acts of sexual misconduct with more than a dozen female trainees assigned to the two companies of which he was a member.[100] Evidence at trial portrayed SSG Simpson as having a reputation as an intimidating, tough disciplinarian. A physically imposing man, he stood six feet, four inches tall, comparatively much larger than his victims.[101]

As the Army Court of Criminal Appeals (ACCA) noted, SSG Simpson was a "sexual predator who carefully selected his victims."[102] In short, the evidence showed that SSG Simpson's behavior often followed a similar pattern: he ordered female trainees to report to his office, made deliberate, repeated sexual advances toward them, and then had sexual intercourse with them. He also had sexual intercourse with victims after using his authority to order them to remote areas of the barracks and to his on-post quarters.[103]

The testimony of SSG Simpson's various victims established that they offered little, if any resistance to his demands, either because they believed resistance was futile or because they feared injury or other harm.[104] Consequently, the military judge instructed the panel, in addition to the elements of rape,[105] on the concept of "constructive force" and its potential impact on the elements of force and lack of consent.[106] The panel found SSG Simpson guilty, *inter alia*, of eighteen specifications of rape and twelve specifications of indecent assault.[107] In an opinion containing a concise discussion of the substantive law of rape, the ACCA affirmed the bulk of the convictions.[108]

On appeal to the CAAF, Simpson argued that the military judge's constructive force instruction was erroneous. The CAAF unanimously affirmed the ACCA's decision, adopting much of the lower court's rationale in its opinion.[109] The court held that the military judge's instructions sufficiently informed the members of the elements of rape, including force and lack of consent, and that constructive force could satisfy both elements.[110] In doing so, the court highlighted three key points. First, the court endorsed the ACCA's list of "factors" that supported a finding of constructive force on the facts of the case, emphasizing that rank disparity alone is insufficient.[111] Second,

98. United States v. Simpson, 58 M.J. 368 (2003).

99. United States v. Simpson, 55 M.J. 674, 679, 693 (Army Ct. Crim. App. 2001). Although the CAAF opinion does not address the underlying facts of the case in detail, it cites the lower court opinion, which contains an extensive discussion of the factual and procedural background. *Simpson*, 58 M.J. at 370.

100. Following an investigation into one trainee's complaint of a non-sexual assault, SSG Simpson received a rehabilitative transfer to another company in the same battalion. *Simpson*, 55 M.J. at 695.

101. *Id.* at 693.

102. *Id.* at 709.

103. *Id.* at 698-707.

104. *Id.* at 707-09.

105. United States v. Simpson, 58 M.J. 368, 377 (2003). Article 120 defines the elements of rape as the following: (a) That the accused committed an act of sexual intercourse; and (b) That the sexual intercourse was done by force and without consent. UCMJ art. 120 (2002).

106. *Simpson*, 58 M.J. at 377-79. The military judge included the following in his instructions:

> In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power to compel the victim to submit against her will. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that constructive force has been applied, thus satisfying the requirement of force. Hence, when the accused's actions and words or conduct, coupled with the surrounding circumstances, created a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that further resistance would be futile, the act of sexual intercourse has been accomplished by force . . . . There is evidence, which, if believed, may indicate that the accused used or abused his military position and/or rank and/or authority in order to coerce and/or force the alleged victim to have sexual intercourse. In deciding whether the accused possibly used or abused his position, rank or authority and whether the alleged victim had a reasonable belief that death or physical injury would be inflicted on her and that further resistance would be futile under the totality of the circumstances, you should consider all the evidence presented in this case that bears on those issues.

Id.

107. In addition, SSG Simpson pled guilty to numerous violations of a general order prohibiting personal relationships between cadre members and trainees. *Simpson*, 55 M.J. at 678.

108. *Id.* at 695-97, 710. The ACCA set aside and dismissed, on factual sufficiency grounds, three indecent assault specifications and one rape specification, modified several other specifications, and reassessed the sentence. *Id.* at 709-10.

109. *Simpson*, 58 M.J. at 377-79.

the court recognized that force and lack of consent are separate elements of rape, although they are often so "intertwined" that the same evidence may prove both of them.[112] Finally, the court held that constructive force arising through the abuse of military authority may satisfy both elements, even though a victim does not fear "great bodily harm."[113] Despite contrary language in the *MCM* and the *Military Judges' Benchbook* (*Benchbook*), the court held that a victim need only reasonably believe that resistance would be futile or that she would suffer some physical injury.[114]

Although *Simpson* is notable, it is not because it breaks new legal ground. After all, the doctrine of constructive force has been around since the infancy of the UCMJ.[115] *Simpson* is perhaps most noteworthy because it clarifies the conflict between case law, the *MCM*, and the *Benchbook* regarding the level of fear required to negate consent and to satisfy the force element. The case is also instructive because it lays out factors that may support a finding of constructive force. While the court did not describe these factors as a "test" and did not specify the quantum of evidence necessary to make such a finding, military practitioners may find the list helpful in evaluating the presence or absence of constructive force in future cases.[116] Moreover, *Simpson* may be helpful, particularly to new counsel, because it discusses the interrelated concepts of force and lack of consent. In cases involving constructive force, these closely related elements often cause confusion, because constructive force may act as a substitute for the element of force, and it may also negate an otherwise permissible inference of the victim's consent.[117]

False Statements to Civilian Police May Be Official
United States v. Teffeau[118]

Staff Sergeant (SSgt) Charles Teffeau was assigned to a recruiting substation in Wichita, Kansas. During the morning of a duty day, SSgt Teffeau told his supervisor that he and a fellow recruiter, SSgt Finch, were going to a nearby town as part of their recruiting duties. The two men drove a government vehicle to the home of a Delayed Entry Program (DEP) recruit to celebrate the impending departure for boot camp of another recruit, Ms. Keely. They stopped to buy beer on the way. After their arrival, SSgt Teffeau and SSgt Finch drank liquor with Ms. Keely for almost three hours, while they remained in their uniforms. Later, as they were returning from a nearby lake where they continued the celebration, SSgt Finch and Ms. Keely were involved in a single-car accident. Ms. Keely was killed and SSgt Finch was injured. Staff Sergeant Teffeau, who was driving the government vehicle, was not injured.[119]

Local police officers, who were aware of SSgt Teffeau's military status and duties, interviewed him more than once as part of their investigation into the accident. At times during the course of these interviews, SSgt Teffeau was in uniform and accompanied by his supervisor. He made three false statements

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110. *Id.*

111. *Id.* at 377. The ACCA opinion identified the following facts in the case, which demonstrated constructive force:

> (1) the appellant's physically imposing size; (2) his reputation in the unit for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience.

Simpson, 55 M.J. at 707.

112. *Simpson*, 58 M.J. at 377.

113. *Id.* at 377-78.

114. *Id.* at 378-79 (citing United States v. Cauley, 45 M.J. 353, 356 (1996)). The *MCM* and the *Benchbook* use "reasonable fear of death or great bodily harm" to describe situations in which constructive force may negate an inference of consent. *See* MCM, *supra* note 30, pt. IV, ¶ 45c(1)(b); U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK ch. 3, para. 3-45-1 n.6 (15 Sept. 2002) [hereinafter BENCHBOOK].

115. *See Simpson*, 55 M.J. at 696 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 199a (1951); United States v. Henderson, 15 C.M.R. 268, 273 (C.M.A. 1954) (discussing the history of constructive force in military jurisprudence).

116. A note of caution—counsel should not misinterpret the *Simpson* factors, which are drawn from the relatively egregious facts of that case, as the bright line standard for constructive force. Instead, they should argue for or against a constructive force based on the totality of the circumstances in each case. Moreover, several of the sexual offenses described in *Simpson* clearly involved the use of actual force. Although the CAAF considered only the issue of constructive force, the ACCA opinion squarely addressed multiple instances in which SSG Simpson used actual force to rape his victims. *See Simpson*, 55 M.J. at 707.

117. *See* MCM, *supra* note 30, pt. IV, ¶ 45c(1)(b). This confusion is not aided by the fact the discussion of these elements is just as often "intertwined" in appellate court opinions and in the *MCM*. *See id.*; *Simpson*, 58 M.J. at 377-78.

118. United States v. Teffeau, 58 M.J. 62 (2003). This article also addresses the *Teffeau* case in its discussion of variance. *See infra.*

119. *Teffeau*, 58 M.J. at 63-64.

to the police concerning the events surrounding the accident.[120] At trial, the defense moved to dismiss the specifications for failure to state an offense, arguing that the statements were not official under Article 107, UCMJ.[121] The military judge denied the motion and made findings of fact and conclusions of law to support his decision.[122] The panel found SSgt Teffeau guilty of the specifications, and the Navy-Marine Court affirmed.[123]

In a unanimous decision, the CAAF affirmed, holding the statements to local police were "official" and thus within the scope of Article 107.[124] At the outset, the court noted that Article 107 sweeps more broadly than the federal law prohibiting false statements, because the "primary purpose of military criminal law—to maintain morale, good order and discipline—has no parallel in civilian criminal law."[125] The court then found that the entire incident and investigation "bore a direct relationship to Appellant's duties and status" as a military recruiter.[126] In support of this conclusion, the court offered a litany of pertinent facts indicating the strong nexus between the events and SSgt Teffeau's military duties.[127] Further, the court noted that military authorities were also investigating the incident and that the subject matter of the police investigation was within the jurisdiction of the courts-martial system.[128]

At first glance, *Teffeau* appears to be a groundbreaking case, one that dramatically expands the government's power to criminalize conduct previously not punishable under the UCMJ. While the case will certainly open up a wide realm of inquiry into the relationship between the accused's position, his authority and the underlying subject of any false statements, the CAAF has defined the standard so that such situations will likely be uncommon, if not rare.

First, the court repeatedly emphasized the "clear and direct relationship" between the underlying circumstance and the accused's duties. This appears to be a strict standard, and given the multiple facts supporting the nexus in *Teffeau*, a burden which will be difficult to meet in many cases.[129] Second, the court noted several times that the underlying subject matter itself—a recruiter's involvement in the death of a recruit—generated substantial military interest. Again, many situations involving soldiers will likely not create the same level of military interest.

Taken together, these apparent limitations show that *Teffeau* will probably have a more modest impact. Nevertheless, when combined with *Fisher*, discussed below, *Teffeau* demonstrates the CAAF's willingness to interpret a crime broadly enough to

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120. *Id*. at 67-68. The contents of the false statements were not discussed in either the Navy-Marine Court or the CAAF opinions.

121. *Id.* at 68. "[O]fficial statements include all . . . statements made in the line of duty." MCM, *supra* note 30, pt. IV, ¶ 31c(1).

122. *Teffeau*, 58 M.J. at 62.

123. United States v. Teffeau, 55 M.J. 756 (N-M. Ct. Crim. App. 2001). The defense also challenged the false official statement specifications, arguing that he had no independent duty or obligation to speak at the time he was interrogated. The defense cited the *MCM*, *supra* note 30, pt. IV, ¶ 31c(6)(a), which read, "A statement made by an accused or suspect during an interrogation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak." *Id.* This provision has since been eliminated from the *MCM*.

124. *Teffeau*, 58 M.J. at 69; UCMJ art. 107 (2002).

125. *Teffeau*, 58 M.J. at 68 (citing United States v. Solis, 46 M.J. 31, 34 (1997)). The federal false statement law requires that the matter fall under federal jurisdiction and that the false statement be "material." *See* 10 U.S.C. § 1001 (2000). From the appellate opinions, it is difficult to tell if the result in *Teffeau* would be different under federal law, because the contents of the false statements were not mentioned, as discussed *supra* at note 124.

126. *Teffeau*, 58 M.J. at 69.

127. *Id.* The court wrote:

> Appellant knew Staff Sergeant Finch and both women as a result of his official duties. Appellant reported to his supervisor that he was meeting with someone in Winfield on January 3, implying to [Gunnery Sergeant] Quilty that the meeting was related to Appellant's recruiting duties. Both the women were newly recruited into the Marine Corps DEP, and both had used SSgt Finch as a recruiter. Appellant and SSgt Finch used an official government vehicle when they went to meet the women. Appellant and SSgt Finch were in uniform when they went to meet the women. Unquestionably, the entire sequence of events had its origin in Appellant's duties, responsibilities, and status as a recruiter. The Winfield police were aware of Appellant's duties and status. A military supervisor accompanied Appellant to the Winfield Police Department the night of the accident. Appellant was in uniform when interviewed by the Winfield police officers.

Id.

128. *Id.* While this is true, it does little to increase the nexus to the appellant's duties since the UCMJ has worldwide jurisdiction over crimes committed by military members on active duty. Likewise, had the court not ruled that the statements were "official," then the statements would not be subject to punishment under the UCMJ.

129. For example, consider whether the same nexus would exist in a more typical situation, in which the accused is a junior enlisted soldier not occupying a position of trust and authority. There would probably not be a sufficient nexus because the accused's status would not factor so heavily in the equation. Also, consider whether the court would find a nexus if an accused lies for some purpose other than to cover up his involvement in a crime during an ongoing investigation. If he simply lies for some less serious, yet still unlawful purpose, the court may not "go the extra mile," to protect the integrity of the investigative process, as it apparently did in *Teffeau*.

encompass the misconduct of a blameworthy accused. Regardless of whether this case is potentially broad or a more limited, result-oriented holding, it is clear that the CAAF will look closely at an accused's position and the risk his conduct poses to the military justice system.

False Swearing by Omission
United States v. Fisher[130]

Specialist Justin Fisher's roommate, Private First Class (PFC) Winchell, was murdered in his barracks at Fort Campbell, Kentucky. Throughout the day and evening leading up to the murder, SPC Fisher provided Private (PVT) Glover with beer and taunted him about losing a fistfight to PFC Winchell the previous day. That night, while Fisher and Glover were in Fisher's barracks room, and PFC Winchell was asleep on a cot in the hallway, Glover became increasingly agitated, pacing the room, muttering and swinging a baseball bat. After about ten minutes, PVT Glover told Fisher he wanted to "f**k up" PFC Winchell, to which Fisher replied, "Go for it." Glover then left the room and hit the sleeping Winchell in the head and neck with the baseball bat, killing him. Glover then returned to Fisher's room and said he had just "whooped [PFC Winchell's] ass." Fisher then helped Glover wash blood off the bat.[131]

In three separate sworn statements to CID, SPC Fisher feigned ignorance and mischaracterized his involvement in the course of events. At trial, SPC Fisher pled guilty to false swearing regarding all three statements.[132] The third statement, which gave rise to the issue on appeal, omitted the facts that Glover left the room after saying he wanted to "f**k up" PFC Winchell and that SPC Fisher responded, "Go for it."[133] During the providence inquiry regarding the third statement, SPC Fisher agreed with the military judge's characterization that the statement was false "by omission," because it failed to mention Glover's final statement of his intent to assault Winchell.[134] Fisher further admitted the statement was false because Glover did not walk to Winchell's side of the room and because Fisher did not believe Glover was going "home" when he left the room, as he said in the statement.[135] The military judge accepted SPC Fisher's plea and found him guilty of false swearing, in violation of Article 134.[136]

On appeal, the only issue the CAAF granted was whether the guilty plea was improvident because it was based on information omitted from the statement.[137] In a unanimous decision, the CAAF affirmed the conviction, finding instead that that statement in question contained numerous literal falsehoods.[138] The court explicitly declined to reach the issue of whether the guilty plea was provident if based solely on information omitted from the statement.[139] In doing so, the court took great care to avoid affirming the falsity of those portions of the statements SPC Fisher agreed were false by omission, yet which contained no literal falsehoods that could be confirmed by the record.[140]

Fisher is significant because it leaves open the question of whether statements rendered false by omission are the proper subject of false swearing charges. Although the CAAF did not rule on the issue, the decision implies that charging actual falsehoods is the preferred course of action. Further, the court's obvious effort to identify and explain how SPC Fisher's statements were literally false may show its willingness to sustain a guilty plea based on relatively insignificant statements, so long as an accused clearly intends to mislead investigators by not telling the full story. The result in *Fisher* may spring from the fact that the case was a guilty plea, or it may signal the court's distaste toward attempts to interfere with the administration of justice. If the latter is true, then *Fisher*, like *Teffeau*, may demonstrate that the CAAF will not narrowly construe crimes governing conduct clearly intended to subvert the criminal justice

130. United States v. Fisher, 58 M.J. 300 (2003).

131. *Id.* at 301.

132. *Id.* at 301-02.

133. *Id.* at 303. The third sworn statement contained the following narrative, which served as the basis for the specification: "[T]hen he [PVT Glover] walked over to Winchell's side of the room, and shortly thereafter I hear [sic] the room door shut. I did not think anything of it, I assumed Glover went home. I did not think anything of it until he came back." *Id.* at 302.

134. *Id.*

135. *Id.* at 303.

136. *Id.* at 300.

137. *Id.* at 301. The court identified the issue, as framed by the appellant, "Whether appellant's plea of guilty . . . is provident where the allegedly false statement was information omitted from an otherwise literally true statement to the CID." *Id.*

138. *Id.* at 304.

139. *Id.*

140. *Id.* These portions included Fisher's statements that he "did not think anything of it" after Glover left the room. *Id.*

system. Even so, counsel should be cautious about charging such conduct as false swearing.

Undoubtedly, the better course of action is to charge only the literal falsehoods as false swearing or as false official statements under Article 107. Of course, when the government makes charging decisions, it does not know whether the accused will plead guilty, and if so, what portions of a statement the accused will admit are false. When the accused fails to tell "the whole truth," government counsel may find it necessary to proceed under the theory of false statement by omission.[141] If the accused intends to plead guilty, however, the government should take great care during plea negotiations to secure a stipulation of fact that shows the statements are factually false.

Disobedience Offenses
No-Contact Order Not Overbroad or Void for Vagueness
United States v. Moore[142]

In response to complaints that he improperly touched a disabled civilian employee, Fire Control Technician Second Class (FC2) James Moore's supervising petty officer ordered him "not to converse with the civilian workers" in an on-base dining facility.[143] Within a half hour, however, FC2 Moore disobeyed the order by speaking to another civilian employee about the incident. He was charged and convicted, *inter alia*, of failure to obey a lawful order.[144] On appeal to the CAAF, FC2 Moore challenged the order as being unconstitutionally vague and overbroad.[145]

The CAAF affirmed the conviction in a unanimous opinion, which discussed several of the basic precepts underlying the offense of disobedience.[146] First, the CAAF stated, a superior's order is presumed to be lawful and is disobeyed at the subordinate's peril. To sustain this presumption, an order must relate to military duty, it must not conflict with the statutory or constitutional rights of the person receiving the order, and it must be a specific mandate to do or not to do a specific act.[147] Second, the right of free speech in the armed services is not unlimited; it must be balanced against the "paramount consideration of providing an effective fighting force" for national defense.[148] In sum, the court held, an order is presumed lawful if it has a valid military purpose and is a clear, specific, narrowly drawn mandate.[149]

Here, the no-contact order was not overbroad in violation of the First Amendment.[150] Noting that the Supreme Court recognizes the military as a separate society with a need for obedience, the court found it unnecessary to determine whether, at its outer limits, the no-contact order was unconstitutional.[151] Given the context of the order and FC2 Moore's almost immediate violation of the order, it was not overbroad. Furthermore, the order was not void for vagueness in violation of the Fifth Amendment.[152] Due process requires that an accused have actual notice of an order's nature and terms and fair notice that his conduct is proscribed.[153] Again, the court found that under the circumstances of the order and FC2 Moore's conduct, he had actual and fair notice that his conduct was criminal.

The *Moore* case demonstrates how the "contextual approach" can save what might otherwise be considered an overbroad order. A civilian may challenge a law restricting First Amendment rights on its face, using hypothetical situations to show how the law might impermissibly burden protected speech. On the other hand, a military member may only

141. Of course, to prove such an offense, the government must have evidence showing the purported omissions made the sworn statement false. In most conceivable cases, this will consist of contradictory admissions or other evidence showing the accused knew something yet failed to mention it in the statement. Such evidence should also be sufficient to prove a statement contains literal falsehoods in most cases. Without such evidence, it will be quite difficult to prove a statement is false by omission, unless the accused pleads guilty and admits to the omissions during providency.

142. United States v. Moore, 58 M.J. 466 (2003).

143. *Id.* at 467.

144. *Id.* at 466-67.

145. *Id*. at 467.

146. *Id*.

147. *Id.* at 467-68 (citing MCM, *supra* note 30, pt. IV, para. 14.c.(2)(a); United States v. Nieves, 44 M.J. 96, 98 (1996)).

148. *Id.* at 468 (citing United States v. Brown, 45 M.J. 389, 396 (1996) (quoting United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972))).

149. *Id*.

150. U.S. CONST. amend. I.

151. *Moore*, 58 M.J. at 468-69 (citing Parker v. Levy, 417 U.S. 733, 743 (1974)).

152. U.S. CONST. amend. V.

153. *See supra* note 91 and accompanying text.

challenge such a law—or in this case an order with a legitimate military purpose—given the circumstances surrounding the order and how it was violated.[154] *Moore* further reinforces the CAAF's commitment to the principles underlying a superior's broad authority, even when this authority is used to curtail a military member's constitutional rights. Finally, *Moore* is instructive because it succinctly lays out the requirements for a lawful order, which may serve as a tutorial for new counsel and a useful refresher for their more experienced counterparts.

No Need to Prove Improper Purpose for Disobedience
United States v. Thompkins[155]

Airman First Class (A1C) Tomal Thompkins was involved in an off-base fight with other military members during which a bystander was shot. To ensure A1C Thompkins did not discuss the matter with other personnel under investigation, his commander ordered him not to have any contact with several named persons, including A1C Smallwood. While under this order, A1C Thompkins told A1C Smallwood's girlfriend he needed a compact disc, which A1C Smallwood had apparently borrowed. A few days later, investigators saw A1C Smallwood give the compact disc to A1C Thompkins. Airman First Class Thompkins was charged with and found guilty, *inter alia*, of willfully disobeying his commander's no-contact order. At trial, the defense challenged the legality of the order, but on appeal to the CAAF, A1C Thompkins instead challenged the conviction for legal sufficiency.[156]

The CAAF affirmed, finding that A1C Thompkins' initiation of contact through a third party and his subsequent contact with A1C Smallwood were legally sufficient evidence to sustain the conviction.[157] The CAAF held that a military member who violates the terms of a no-contact order is subject to punishment under either Article 90 or Article 92, without the need to prove the contact was made for an improper purpose.[158] The court held that public policy supports the strict reading of a no-contact order issued by a commander with a legitimate interest in deterring contact between a military member and another person.[159] Thus, a commander is not required to scrutinize every unauthorized contact, after the fact, to find that the accused had an unlawful purpose.[160]

Thompkins is significant because it establishes a bright line rule: commanders need not evaluate whether disobedience of a no-contact order had a non-criminal purpose so long as the order was lawful. The case also highlights the limits of the contextual approach described in *Moore*. Although the court will consider the context of an accused's violation of an order in determining whether the order was vague or overbroad, it will not examine the underlying reason for the disobedience, unless, of course, that reason raises a legal defense, such as justification or duress. Taken together, the *Moore* and *Thompkins* decisions reveal the CAAF's willingness to support the legitimate use of command authority. The cases also show the court's recognition that relatively minor disobedience offenses can have a powerful impact on good order and discipline, even when the immediate harm is not apparent.

Child Pornography: United States v. O'Connor[161]

Senior Airman (SrA) Barry O'Connor pled guilty, *inter alia*, to receiving and possessing images depicting child pornography, in violation of the Child Pornography Prevention Act of 1996 (CPPA), charged under Article 134, Clause 3.[162] After the Air Force Court and the CAAF affirmed the convictions, SrA O'Connor petitioned the Supreme Court for certiorari, arguing that the definition of child pornography was unconditionally vague and overbroad.[163] In light of its recent decision in *Ashcroft v. Free Speech Coalition*,[164] holding certain portions of the CPPA to be unconstitutional, the Supreme Court vacated the

154. *See* United States v. Padgett, 48 M.J. 273, 278 (1998).

155. United States v. Thompkins, 58 M.J. 42 (2003).

156. *Id.* at 44-45.

157. *Id.*

158. *Id.* at 45. The record did not indicate the contents of the compact disk (e.g., music or information relevant to the incident under investigation). *Id.* at 44.

159. *Id.* at 45.

160. *Id.*

161. United States v. O'Connor, 58 M.J. 450 (2003).

162. *Id.* at 451; 18 U.S.C. §§ 2251-60 (2000).

163. *O'Connor*, 58 M.J. at 451.

164. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Specifically, the Court found unconstitutional the prohibition against images that "appear[] to be" minors or that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that they depict minors. *Id.* at 245, 258 (citing 18 U.S.C. § 2256(8)(B), (D)).

findings and remanded the case to the CAAF for further consideration.[165]

On remand, the CAAF set aside the findings, holding that the "virtual" or "actual" nature of the images was of constitutional significance after *Free Speech Coalition*.[166] For a plea of guilty to a violation of the CPPA to be provident, it must reflect that the images depict "actual" minors, a fact which SrA O'Connor's providence inquiry failed to establish.[167] Noting that the First Amendment rights of civilians and military members "are not necessarily coextensive," the court stated that it will continue to closely examine the connection between conduct protected by the First Amendment and its effect in the military environment.[168] Nevertheless, the court declined to uphold SrA O'Connor's guilty plea as service-discrediting conduct in violation of Article 134, Clause 2.[169] Here, the court held, the plea inquiry was focused on whether SrA O'Connor's conduct violated the CPPA, not on whether his conduct was of a nature to bring discredit on the armed forces.[170] Thus, the record did not demonstrate that he clearly understood the nature and implications of his conduct as an Article 134, Clause 2 offense.

Although the law in this area remains unsettled, *O'Connor* is important for several reasons. First, it establishes that the "actual" character of visual depictions is now a factual predicate to any plea of guilty under the CPPA and by extension, an element of an offense charged as a violation of the CPPA.[171] Accordingly, *O'Connor* has served as the basis for invalidating a number of convictions for CPPA violations.[172] Even so, the CAAF left open the door to charging possession of images of child pornography under several alternative theories of liability. For example, the CAAF recently held an accused's possession of such images may be service-discrediting or prejudicial to good order and discipline, regardless of whether the images fall under the unconstitutional definitions of the CPPA and are protected under the First Amendment.[173] Likewise, possession of even constitutionally-protected child pornography may constitute conduct unbecoming an officer, or it may violate punitive service regulations if viewed on a government computer.[174] In light of the evolving case law, government counsel would be well-advised to charge possession of child pornography both as a violation of the CPPA and under one of these alternative theories in order to maximize the chance of the conviction being affirmed on appeal.[175]

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165. O'Connor v. United States, 535 U.S. 1014 (2002).

166. *O'Connor*, 58 M.J. at 453.

167. *Id.* at 453-54.

168. *Id.* at 455.

169. *Id.* at 454-455; *cf*. United States v. Sapp, 53 M.J. 90, 92 (2000) (affirming appellant's improvident plea to violation of the CPPA, charged under Article 134, Clause 3, as service-discrediting conduct in violation of Article 134, Clause 2); United States v. Augustine, 53 M.J. 95, 96 (2000).

170. *O'Connor*, 58 M.J. at 455.

171. Military courts of criminal appeals have affirmed convictions in several recent cases, finding the evidence sufficient to show the images at issue depicted actual children. *See* United States v. Sollmann, 59 M.J. 831 (A.F. Ct. Crim. App. 2004); United States v. Schornborn, 2004 CCA LEXIS 70 (N-M. Ct. Crim. App. Mar. 22, 2004) (unpublished) (holding the "actual character" of the images and the accused's providence inquiry showed that the images were of actual minors); United States v. Moffeit, 2004 CCA LEXIS 55 (A.F. Ct. Crim. App. Feb 18, 2004) (unpublished) (affirming finding of guilt when expert testimony and photographs themselves provided convincing evidence that they depicted actual children); United States v. Tynes, 58 M.J. 704 (Army Ct. Crim. App. 2003) (affirming conviction for possession of images depicting actual children). Of particular interest, the *Tynes* opinion contains appendices with pattern instructions for military judges to use when instructing on violations of 18 U.S.C. §§ 2252A(a)(2) and 2252A(a)(5)(B) (2002) (receipt and possession of child pornography). *Tynes*, 58 M.J. at 710-13.

172. *See*, *e.g.*, United States v. Lee, 59 M.J. 261 (2004); United States v. Harrison, 59 M.J. 262 (2004); United States v. Mathews, 59 M.J. 263 (2004); United States v. Veenstra, 2004 CCA LEXIS 54 (A.F. Ct. Crim. App. Feb. 25, 2004) (unpublished).

173. *See* United States v. Mason, No. 02-0849, 2004 CAAF LEXIS 539 (June 10, 2004) (holding accused's guilty plea to a violation of the CPPA improvident, yet affirming the plea's providency to a lesser-included offense under Clauses 1 and 2 of Article 134); United States v. Irvin, No. 03-0224, 2004 CAAF LEXIS 538 (June 10, 2004).

174. *See* United States v. Mazer, 58 M.J. 691 (N-M. Ct. Crim. App. 2003), *rev. granted*, 59 M.J. 217 (2003) (specifying as an issue whether possession of child pornography can serve as a basis for conviction under Article 133 for conduct unbecoming an officer, in light of *O'Connor*); United States v. Cream, 58 M.J. 750 (N-M. Ct. Crim. App. 2003) (affirming conviction for storing and viewing pornographic images on a government computer, in violation of the Joint Ethics Regulation).

175. Although this practice may result in a multiplicity motion from the defense, it would eliminate any concerns about notice if the panel found the accused guilty of—or an appellate court affirmed the conviction under—the charged alternative theory as a lesser-included offense. *See* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994) ("[I]t seems clear to us that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives.").

Raising the Mistake of Fact Defense
United States v. Hibbard[176]

Chief Master Sergeant (CMSgt) Bobby Hibbard was charged with raping a subordinate noncommissioned officer, Technical Sergeant (TSgt) W, while both were deployed to Saudi Arabia. At trial, TSgt W testified that on her arrival, CMSgt Hibbard showed her around the base, pointing out a "private" swimming pool. She testified that two days later, after CMSgt Hibbard repeatedly asked her to accompany him to the pool, TSgt W eventually agreed to go with him. That evening, the two spent about an hour in the pool and in an adjacent hot tub, when CMSgt Hibbard unexpectedly rushed at TSgt W and sexually assaulted her. Soon afterward, CMSgt Hibbard and TSgt W had sexual intercourse, which she testified was nonconsensual, on the pool deck. Toward the conclusion of her direct testimony, TSgt W stated that after the incident, CMSgt Hibbard offered, "Well, at least this was consensual," as they were preparing to leave the pool area.[177]

Throughout the trial, the defense theory was that no sexual intercourse occurred and that TSgt W fabricated her rape allegation in order to receive a transfer back to the United States.[178] Nevertheless, the defense counsel requested an instruction on the defense of mistake of fact regarding TSgt W's consent to sexual intercourse. Notably, the defense cited evidence other than CMSgt Hibbard's final statement to TSgt W in support of its request.[179] The military judge denied the request, and the panel found CMSgt Hibbard guilty of rape.[180]

The CAAF affirmed the conviction, holding that while an honest and reasonable mistake of fact as to the victim's lack of consent is an affirmative defense to a charge of rape, the military judge did not err by declining to instruct the panel on the defense.[181] The court held that the totality of the circumstances, to include TSgt W's testimony and the manner in which the issue was litigated at trial, was insufficient to reasonably raise the defense.[182] The court noted that the defense counsel's opening statement, cross-examination of TSgt W, case-in-chief, and closing argument all centered on the defense theory that no sexual intercourse occurred.[183] While stating that the defense need not present evidence of mistake of fact in its case on the merits nor discuss such evidence in argument to obtain an instruction on mistake of fact, the CAAF held that the military judge may consider the absence of such presentation in assessing whether the defense was reasonably raised by the evidence.[184]

Hibbard is significant, especially for trial defense counsel, because it effectively imposes a burden on the defense to ensure that special defenses are reasonably raised to obtain an instruction. In this respect, the CAAF's holding appears to conflict with the Rules for Court Martial (RCM) and the discussion portions of the *MCM*. For example, RCM 916 imposes no burden on the defense to raise or to prove a special defense, except for lack of mental responsibility or mistake of fact as to age for carnal knowledge.[185] Further, RCM 920 states that the military judge shall instruct on any special defense "in issue."[186] In *Hibbard*, however, the unanimous court held a military judge should consider not only the evidence presented, but also the defense counsel's opening statement and closing arguments.[187]

The result in *Hibbard* may be troubling to defense counsel for several reasons. Although statements by counsel are obviously not evidence, *Hibbard* holds that such statements may affect whether a defense is reasonably raised. During opening statements, defense counsel should have a good grasp of what their own witnesses will say on the stand, but their knowledge of how opposing witnesses will testify—particularly during cross-examination and in response to questions from members—is naturally more speculative. To place the onus on

176. United States v. Hibbard, 58 M.J. 71 (2003).

177. *Id*. at 73-74.

178. *Id*. at 73.

179. *Id*. at 74.

180. *Id*. at 75.

181. *Id.* at 72.

182. *Id*. at 76-77.

183. *Id.* at 73-75.

184. *Id*. at 76.

185. MCM, *supra* note 30, R.C.M. 916(b). The discussion of this sub-paragraph states, "A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial," and notes that multiple and inconsistent defenses are allowed. *Id*. Discussion.

186. *Id.* R.C.M. 920(e)(3). The discussion adds that a defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.*

187. *Hibbard*, 58 M.J. at 76.

counsel to anticipate such evidence in an opening statement seems unfair. Likewise, to effectively require defense counsel in their closing argument to address a defense the military judge has informed them he will not instruct on seems to impose a burden on defense counsel well beyond that required by RCM 620. Since an accused may assert inconsistent defenses raised by the evidence, then he should be entitled to an instruction on all applicable defenses, regardless of how central they are to the defense theory. This would allow his counsel to argue the strongest defense while relying on the judges' instructions to get the perhaps weaker defenses—though still raised by the evidence—in front of the panel. *Hibbard* appears to substantially undercut this protection.

Consequently, defense counsel should be prepared to take appropriate measures to obtain the instructions their case requires, whether it be by eliciting evidence from government witnesses on cross-examination, introducing it during the defense case-in-chief, or addressing the defense during their opening statement and closing argument. In light of *Hibbard*, the defense cannot afford to rely on the court to instruct sua sponte on defenses—particularly inconsistent defenses—when they are only tangential to the defense theory. This may prove to be a tricky situation in many cases, as inconsistent defenses are allowed, yet often viewed with suspicion by a panel.

Modification[188]
United States v. Parker[189]

Sergeant (SGT) Wayne Parker was charged with rape of multiple victims, including victim "AL." One specification alleged a rape of AL between 1 February and 31 March 1995. In a sworn statement to investigators in June 1995, AL said SGT Parker raped her "in February or March," without specifying the year.[190] In a videotaped deposition eleven days before trial in April 1996, however, AL said she believed the rape occurred in 1993. At trial, the government moved to amend the dates in the relevant specification to read 1993. The defense objected, arguing the amendments were major changes under RCM 603, because the accused would not have adequate notice to defend against a charge of such misconduct in 1993. The military judge denied the motion.[191] Next, the government offered AL's deposition under MRE 413 to support the charged rapes of other victims, and the judge admitted the deposition over defense objection.[192] The government introduced no other evidence of sexual contact between AL and SGT Parker in 1993. At the close of the government's case, the military judge denied a defense motion to dismiss the specification for the rape of AL under RCM 917.[193] The panel found SGT Parker guilty, by exceptions and substitutions, of raping AL between August 1993 and March 1995.[194]

The CAAF set aside the conviction, holding the military judge erred in denying the defense motion to dismiss.[195] Noting that the time, place and nature of SGT Parker's interaction with the victims was a "major focus" of the "closely contested" trial, the court held that the military judge's pretrial rulings "established the parameters" for the case.[196] By denying the government's motion to amend and by admitting AL's deposition for the limited purpose of MRE 413, the military judge highlighted the government's burden to introduce sufficient evidence to prove the rape of AL in 1995, which it failed to meet.[197] Thus, since AL's deposition was admitted only to support the other charged offenses, there was no evidence of a rape of AL in 1995.[198] The court stated the government could have withdrawn and preferred new charges against SGT Parker.[199]

Parker is notable for practitioners because it highlights the consistency between the standards used to measure a major

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188. The three cases discussed *infra* involve the closely related issues of amendment and variance. Because both of these concepts involve changes to specifications as alleged in the charge sheet, and because the rules for measuring the propriety of such changes are similar, military appellate courts have used the term "modification" to describe both types of changes. *See, e.g.*, United States v. Moreno, 46 M.J. 216 (1997).

189. United States v. Parker, 59 M.J. 195 (2003).

190. *Id.* at 197.

191. *Id.* at 198.

192. *Id.* at 198-99.

193. *Id.* at 199-200.

194. *Id.* at 200.

195. *Id.* at 201.

196. *Id.* at 200-01.

197. *Id.* at 201.

198. *Id.*

199. *Id.*

change and a fatal variance. If an accused is surprised at trial by an amendment or a variance, and if his ability to prepare a defense is thereby compromised, then the modification is improper and should not be allowed. If proof of the offense requires such a change, then the government should be prepared to withdraw and re-prefer the charge if the military judge denies the requested amendment. Likewise, defense counsel should move for dismissal of any modified findings when the excepted and substituted language has the same effect as a major change.

Fatal Variance: United States v. Lovett[200]

Staff Sergeant (SSgt) Joshua Lovett was charged with raping his five-year-old step-daughter. He was also charged with solicitation to murder his wife, the girl's mother, to whom the girl first described the events. At trial by members, the evidence indicated that SSgt Lovett told a man he wanted his wife "to disappear," gave the man her picture and car keys, and discussed how much it would cost. During the instructions conference, the government asked the military judge to instruct the panel on a lesser-included offense of solicitation to commit a general disorder under Article 134, UCMJ. Over defense counsel's objection, the military judge instructed the panel on the requested lesser-included offense, which constituted, in effect, solicitation to obstruct justice. The panel found SSgt Lovett guilty, by exceptions and substitutions, of the instructed lesser-included offense.[201]

In a unanimous decision, the CAAF set aside the conviction of the modified offense.[202] The court found that the original specification put the appellant on notice to defend against solicitation to commit premeditated murder, an offense that is substantially different from solicitation to obstruct justice.[203] Noting that findings by exceptions and substitutions "may not be used to substantially change the nature of the offense," the court held that the substituted language created a material variance.[204] Because this variance prevented the appellant from adequately preparing a defense, it was fatal.[205]

Lovett is significant because it clearly lays out the two-pronged standard for a fatal variance: it must be material, and it must prejudice the accused.[206] Under the first prong, a variance is material if it substantially changes the nature of the charged offense. Second, such a variance is prejudicial if it places an accused at risk of another prosecution for the same misconduct, if it denies the accused the opportunity to defend himself against the modified offense, or if the accused has been misled and is thereby unable to adequately prepare for trial.[207]

Lovett further shows the CAAF's apparent discomfort with lesser-included offenses arising from violations of Article 134, the general article. Although case law firmly supports allowing the "enumerated" Article 134 offenses as lesser-included offenses, the court in *Lovett* appears less willing to endorse "unenumerated" general disorders to provide an accused with notice of lesser-included offenses he may face.[208] If this is not the case, then the result in *Lovett* is difficult to explain, as the overt acts alleged in the specification were virtually the same as those contained in the modified specification. It is unclear what, if any, lesser-included offense the CAAF would have found appropriate for the evidence presented in *Lovett*. In light of this, government counsel should be wary of relying on lesser-included "unenumerated" offenses and instead should charge such offenses in the alternative to allow for exigencies of proof at trial. On the other hand, when faced with a variance, defense counsel should be prepared to offer how the alleged specification affected their trial preparation to make a showing of prejudice.

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200. United States v. Lovett, 59 M.J. 230 (2004).

201. *Id.* at 231-33. The modified specification contained the same overt acts as the original specification alleging solicitation to murder. In addition, the modified specification stated that the accused gave the man his wife's car keys and that he solicited the man "to cause [his wife] to disappear or to wrongfully prevent her from appearing in a civil or criminal proceeding." *Id.* at 235.

202. *Id.* at 237.

203. Although the original specification did not mention premeditation, the court said it "suggested" premeditated murder under Article 118(1). The court also noted that the alleged overt acts "impl[ied] premeditation" by the accused and that the defense premised its trial preparation on this assumption. *Id.*; *see also* UCMJ art. 118(1) (2002).

204. *Lovett*, 59 M.J. at 235 (citing MCM, *supra* note 30, R.C.M. 918(a)(1)).

205. *Id*. at 236-37.

206. *Id.* at 235 (citing United States v. Teffeau, 58 M.J. 62, 66 (2003)).

207. *Id.* at 236 (citing *Teffeau*, 58 M.J. at 67).

208. *See* United States v. Foster, 40 M.J. 140 (1994).

Ambiguous Findings: United States v. Walters[209]

Airman Basic (AB) Ricky Walters II was charged in a duplicitous specification with wrongful use of methylenedioxymethamphetamine (MDMA) "on divers occasions between on or about 1 April 2000 and on or about 18 July 2000."[210] At trial before members, the evidence indicated that AB Walters may have used MDMA on as many as six occasions.[211] Nonetheless, the panel found him guilty, by exceptions and substitutions, of using MDMA on "one occasion" during the same period, without specifying the occasion.[212]

In a four-to-one decision, the CAAF set aside the findings and dismissed the charge and specification with prejudice.[213] The majority held that the findings of guilty and not guilty did not disclose the conduct on which each of them was based, so they were ambiguous.[214] The military judge erred in giving incomplete instructions regarding the use of findings by exceptions and substitutions and in failing to secure clarification of the court-martial's findings before their announcement.[215] Consequently, AB Walters' substantial right to a full and fair review of his conviction under Article 66(c) was rendered impossible by the ambiguous findings, because the Air Force Court could not conduct its required factual sufficiency review.[216]

Walters is notable because it requires military judges and government counsel to ensure that findings by exceptions and substitutions will allow for sufficient review by appellate courts. As the court noted, "Where a specification alleges wrongful acts on 'divers occasions,' the members must be instructed that any findings by exceptions and substitutions that remove the 'divers occasions' language must clearly reflect the specific instance of conduct on which their modified findings are based."[217] The panel can do so by referring to a relevant date or other facts in evidence to put the accused and reviewing courts on notice of what conduct served as the basis for the findings.[218]

Fatal Variance: United States v. Teffeau[219]

As previously discussed in this article, SSgt Teffeau was found guilty of making false official statements to local police during an investigation into the death of a DEP recruit. He was also charged under Article 92(1), UCMJ, with violating subparagraph "6(d)" of a lawful general order by providing alcohol to a person enrolled in the DEP.[220] The panel found SSgt Teffeau guilty by exceptions and substitutions of violating the superior paragraph "6" of the same order by wrongfully engaging in a "nonprofessional personal relationship" with the same DEP member.[221] On appeal, the Navy-Marine Court of Criminal Appeals (N-MCCA) found that the findings created a material variance by convicting the accused of a "related, but materially different, incident than the one originally charged in

209. United States v. Walters, 58 M.J. 391 (2003).

210. *Id.* at 392.

211. *Id.* at 392-93.

212. *Id.* at 394. The military judge's findings instructions included the following:

> If you have a doubt about the time or place in which the charged misconduct occurred, but you are satisfied beyond a reasonable doubt that the offense was committed at a time, at a place, or in a particular manner which differs slightly from the exact time, place or manner in the specification, you may make minor modifications in reaching your findings by changing the time, place, or manner in which the alleged misconduct described in the specification occurred, provided that you do not change the nature or identity of [the] offense . . . . [I]f you do what is called findings by exceptions and substitutions, which is the variance instruction I have given you earlier, where you may—and this is just an example—on the divers uses, you may find just one use, and you except out the words divers uses and you substitute in the word one time, or something like that.

Id. at 393.

213. *Id.* at 397.

214. *Id.* at 395-97.

215. *Id.* at 396.

216. *Id.* at 396-97.

217. *Id.* at 396.

218. *Id.*

219. United States v. Teffeau, 58 M.J. 62 (2003).

220. *Id.* at 64 (citing Headquarters, U.S. Marine Corps Recruit Depot, San Diego, Order No. 1100.4a (21 May 1992)).

221. *Id.* at 65-66.

the specification."[222] Still, the N-MCCA denied relief, holding that the variance did not substantially prejudice SSgt Teffeau.[223]

In a unanimous decision, the CAAF set aside the findings, holding that the modified specification constituted a fatal variance.[224] Accepting the N-MCCA's finding that the modified specification reflected a "different incident" than the one charged, the CAAF disagreed that the variance was not prejudicial.[225] The variance substantially prejudiced SSgt Teffeau's due process rights by depriving him of the opportunity to defend against the substituted paragraph of the order.[226]

On the variance issue, *Teffeau* is significant because it shows the CAAF will strictly enforce an accused's right to notice of the charge against which he must defend. While the *Moore* and *Thompkins* cases, discussed *infra*, support a commander's legitimate use of authority to enforce discipline, *Teffeau* shows that due process notice serves as the ultimate backstop to that authority. Disobedience of an order may be punishable, but an accused must still be able to defend himself if he is to be punished. In light of *Teffeau*, government counsel would be well-advised to charge orders violations under more general, superior paragraphs to allow for exigencies of proof. By the same token, defense counsel should move for a bill of particulars to direct the government to specify in as much detail as possible what conduct serves as the basis for the alleged violation. *Teffeau* further underscores the two-prong test for measuring a fatal variance. To satisfy the test, defense counsel should be prepared to show how the modification of the original specification prejudiced their trial preparation.

Taken together, the CAAF's decisions in *Parker*, *Lovett*, *Teffeau*, and *Walters* provide an excellent primer on the concepts of amendment and variance. Although the cases make no dramatic changes to the law, they offer sound practical guidance to counsel and military judges who face these issues.

Multiplicity: United States v. Hudson[227]

While under pretrial restriction for wrongful use of a controlled substance (OxyContin), Fireman Apprentice (FA) David Hudson took a government vehicle and left the Coast Guard installation for two days. He pled guilty and was convicted, *inter alia*, of breaking restriction and unauthorized absence. On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) determined the absence charge was a lesser-included offense of the breaking restriction charge; thus, the two charges were multiplicious. The CGCCA held the military judge committed plain error by not dismissing the absence charge, set aside the finding of guilty for that offense, and reassessed the sentence. The Coast Guard Judge Advocate General certified the case to the CAAF.[228]

The CAAF reversed the CGCCA in a unanimous decision, holding that the military judge's decision not to dismiss the absence charge was not plain error.[229] Noting that an unconditional guilty plea waives a multiplicity claim absent plain error, the court said that if two specifications are facially duplicative, that is, "factually the same," then they are multiplicious, and it is plain error not to dismiss one of them.[230] Using the "elements" test, the court lined up the elements realistically to determine whether one offense is rationally derived from the other.[231] By comparing the "factual conduct alleged in each specification" and considering the providence inquiry, the court found the offenses factually distinguishable.[232] First, the breaking restriction specification required proof of FA Hudson's restriction by an authorized individual, which the absence offense did not.[233] Second, the absence specification required proof of his absence for the specified two-day period, which the breaking restriction offense did not.[234] Consequently, the two offenses were not factually the same.

Hudson is a useful case for practitioners due to its straightforward application of the rules governing multiplicity, which

222. *Id.* at 66 (citing United States v. Teffeau, 55 M.J. 756, 762 (N-M. Ct. Crim. App. 2001)).

223. *Id.*

224. *Id.* at 67. Judge Baker filed a concurring opinion. *Id.* at 69.

225. *Id.* at 67.

226. *Id.*

227. United States v. Hudson, 59 M.J. 357 (2004).

228. *Id.* at 358.

229. *Id.* at 361.

230. *Id.* at 358-59.

231. *Id.* at 359.

232. *Id.* at 359-60.

233. *Id.* at 360-61.

is perhaps the most frequently misunderstood area in the law of pleadings. Although the CAAF opinion discusses multiplicity generally, it focuses on the concept of plain error, the more deferential standard of review given to a military judge's decision on multiplicity when the accused pleads guilty. *Hudson* is also noteworthy in that the CAAF endorses the use of the accused's statements during providency to determine whether the charged offenses are factually the same. In doing so, the court is effectively looking at the offense "as proven" rather than "as alleged in the specification," which is the standard method for weighing a multiplicity claim using the elements test.[235] However, counsel should note that because *Hudson* was a guilty plea, considering the providency inquiry was proper.[236] In a contested case, of course, there is no providency inquiry, and a multiplicity motion is often raised during pretrial motions before any evidence is admitted. Even so, if a multiplicity motion is raised after evidence is admitted, such as during post-trial proceedings or on appeal, counsel should realize that the elements test applies only to the factual content of the specification not the evidence admitted at trial.

Conclusion

If you've heard this story before, don't stop me, because I'd like to hear it again.[237]

Examining the past year's developments in substantive criminal law, we can identify three somewhat interrelated but noteworthy trends. First, the UCMJ amendments have expanded an accused's criminal liability, particularly for crimes against victims whom Congress feels are in need of additional protection: child abuse victims[238] and unborn children.[239] Similarly, the CAAF has shown a willingness to define and clarify substantive crimes in a manner that extends the reach of what is considered criminal under the UCMJ. This willingness is revealed in three distinct areas: crimes that provide enhanced protection to certain classes of victims,[240] crimes that threaten legitimate law enforcement functions,[241] and crimes against command authority.[242] At the same time, the CAAF has scrupulously enforced the defense's trump card—due process notice—to ensure an accused will receive a fair trial when charged with such offenses.[243]

Yet several of the recent developments leave significant questions unanswered. What is the future of Article 125's prohibition of sodomy? How will prosecutions for "virtual" child pornography cases be resolved? What effect will the amended Article 43 have on unexpired limitations periods for child abuse offenses? How will Article 119a affect military justice? Some of these issues currently await disposition at the CAAF; they and others may eventually be resolved in the Supreme Court.[244] Although some of these developments are not novel, they do offer sound guidance to counsel who encounter such issues in their military practice. So whether you intend to just sample the *hors d'oeuvres* or go straight to the buffet, perhaps this article will serve as food for thought. Dig in!

234. *Id.* at 361.

235. *See, e.g*, United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994); United States v. Harwood, 46 M.J. 26, 28 (1997).

236. *See* United States v. Lloyd, 46 M.J. 19, 23 (1997) (holding the CCA must consider the providence inquiry to ensure a guilty plea is correct in law and fact under Article 66(c), UCMJ).

237. Groucho Marx, *quoted in* World of Quotes, *available at* http://www.worldofquotes.com/author/Groucho-Marx/1/ (last visited June 30, 2004).

238. *See* UCMJ art. 43 (2002).

239. *See id.* art. 119a.

240. *See* United States v. Saunders, 59 M.J. 1 (2003) (victims of harassment residing overseas); United States v. Simpson, 58 M.J. 368 (2003) (trainee victims of sexual offenses committed by superiors).

241. *See* United States v. Teffeau, 58 M.J. 62 (2003) (false statements to civilian police); United States v. Fisher, 58 M.J. 300 (2003) (false sworn statements to military criminal investigators).

242. *See* United States v. Thompkins, 58 M.J. 42 (2003) (no-contact order); United States v. Moore, 58 M.J. 466 (2003) (no-contact order).

243. *See* United States v. Lovett, 59 M.J. 230 (2004); United States v. Parker, 59 M.J. 195 (2003); United States v. Teffeau, 58 M.J. 62 (2003). *But see* United States v. Saunders, 59 M.J. 1 (2003) (holding the accused's due process rights were satisfied).

244. For example, regardless of how the CAAF rules in the pending sodomy cases, it is likely that the Supreme Court will eventually hear the issue. Likewise, given the trend of affirming child pornography convictions and the use of alternative theories of liability that do not exist in the civilian sector, the Court may hear some of these cases.